

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

November 6, 2001

IN RE:)	
)	
COMPLAINT OF ACCESS INTEGRATED)	DOCKET NO.
NETWORK, INC. AGAINST BELL SOUTH)	01-00808
TELECOMMUNICATIONS, INC.)	
)	
)	
IN RE:)	
)	
COMPLAINT OF XO TENNESSEE, INC.)	DOCKET NO.
AGAINST BELL SOUTH)	01-00868
TELECOMMUNICATIONS, INC.)	

ORDER

This docket came before the Hearing Officer appointed by the Tennessee Regulatory Authority ("Authority") for consideration of the following: 1) the Authority's suggestion that Docket Nos. 01-00808 and 01-00868 be consolidated; 2) the parties' disputes over the language of the protective order; 3) the *Motion to Open Show Cause Proceeding* filed by Access Integrated Networks, Inc. ("AIN") in Docket No. 01-00808; 4) petitions to intervene filed by the Consumer Advocate and Protection Division of the Office of the Attorney General and Reporter ("Consumer Advocate") in Docket Nos. 01-00808 and 01-00868; and 5) motions to take discovery filed in Docket Nos. 01-00808 and 01-00868 by AIN and XO Tennessee, Inc. ("XO") on November 1, 2001.

I. PROCEDURAL HISTORY

AIN filed a complaint against BellSouth Telecommunications, Inc. (“BellSouth”) on September 18, 2001. The complaint was assigned Docket No. 01-00808. According to the complaint, on August 27, 2001, a representative of Berry Direct, acting on behalf of BellSouth, offered a customer three free months of service in exchange for enrolling in the “BellSouth Key Business Discount Program.” AIN further alleged that the tariff applicable to the “BellSouth Key Business Discount Program” does not include three free months of service.¹ AIN asserted that this offer violates Authority Rule 1220-4-8-.09(2)(c)(3) and the discriminatory pricing provisions of Tenn. Code Ann. § 65-4-122 and, therefore, requested the Authority issue a show cause order pursuant to Tenn. Code Ann. § 65-2-106.²

BellSouth filed its answer to AIN’s complaint on October 2, 2001. BellSouth admitted that it engaged Berry Direct to market the “BellSouth 2001 Key Business Discount Program.”³ BellSouth further admitted that a representative of Berry Direct sent the customer a fax, the cover sheet of which stated: “This will also give you three mos, 1st – 6th – 12th, no charge in each business – Fax right back!”⁴ BellSouth also admitted three free months of service is not within the “BellSouth 2001 Key Business Discount Program.”⁵ In further answering the complaint, BellSouth stated that it is the policy of BellSouth to offer services in conformance with tariffs and that it has suspended all marketing by Berry Direct.⁶

¹ See *In re: Complaint of Access Integrated Network, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 01-00808, *Complaint of Access Integrated Networks, Inc.*, paras. 4 & 5 (Sept. 18, 2001).

² See *id.* at paras. 6 & 7.

³ See *id.*, *Answer of BellSouth Telecommunications, Inc.*, para. 3 (Oct. 2, 2001).

⁴ *Id.* at para. 4.

⁵ See *id.* at para. 5.

⁶ See *id.* at para. 4.

XO filed its complaint against BellSouth on October 9, 2001. This complaint was assigned Docket No. 01-00868. XO alleged that on September 5, 2001 a BellSouth Senior Account Executive offered to provide a customer with service pursuant to the “BellSouth Key Business Discount Program” and to include three free months of service.⁷ As in AIN’s complaint, XO asserted that this offer violates Authority Rule 1220-4-8-.09(2)(c)(3) and the discriminatory pricing provisions of Tenn. Code Ann. § 65-4-122 and, therefore, requested the Authority issue a show cause order pursuant to Tenn. Code Ann. § 65-2-106.⁸

BellSouth filed its answer to XO’s complaint on October 25, 2001. BellSouth admitted that a BellSouth representative contacted the customer on September 5, 2001 and sent the customer a fax that contained language regarding three free months of service.⁹ BellSouth denied that the Authority should issue a show cause order citing the fact that BellSouth has suspended “all of these sales activities by Berry Direct and BellSouth to Tennessee customers.”¹⁰

In the midst of the complaint and answer process, AIN filed a *Motion to Open Show Cause Proceeding* in Docket No. 01-00808. In the motion, AIN referenced its complaint filed in Docket No. 01-00808, the complaint filed in Docket No. 01-00868, and a third instance that allegedly occurred in Southhaven, Mississippi.¹¹ After further discussion, AIN asserted that the Authority has a legal duty to enforce laws under its jurisdiction and has not previously hesitated to open show

⁷ See *In re: Complaint of XO Tennessee, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 01-00868, *Complaint of XO Tennessee, Inc.*, para. 4 (Oct. 9, 2001).

⁸ See *id.* at paras. 6 & 8.

⁹ See *id.*, *Answer of BellSouth Telecommunications, Inc.*, para. 3 (Oct. 25, 2001).

¹⁰ *Id.* at para. 8.

¹¹ See *In re: Complaint of Access Integrated Network, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 01-00808, *Motion to Open Show Cause Proceeding*, p. 1 (Oct. 16, 2001).

cause proceedings and impose sanctions.¹² AIN concluded by asserting that this “matter is far broader than a dispute between BellSouth and a competing carrier.”¹³

BellSouth filed its response to the *Motion to Open Show Cause Proceeding* on October 24, 2001. BellSouth asserted that the motion should be dismissed because the allegations set forth in the motion are the subject of XO’s and AIN’s complaints and explained that there is nothing to gain from convening another docket.¹⁴

On October 24, 2001, the Consumer Advocate filed petitions to intervene in both dockets. In each petition, the Consumer Advocate asserted that its intervention is on behalf of Tennessee consumers who will be adversely affected by price discrimination. In the petition filed under Docket No. 01-00808, the Consumer Advocate stated: “The possibility that misrepresentations may be more pervasive concerns the Attorney General and therefore, he believes an investigation is necessary and appropriate under the existing circumstances.”¹⁵

On October 26, 2001, BellSouth filed its non-proprietary responses to the Authority’s data requests issued on October 12, 2001. BellSouth explained that it would file its proprietary responses upon the entry of a protective order. On October 26, 2001, AIN and XO filed a letter stating that they believed the proposed protective order entered should be amended to permit the distribution of proprietary information to “other, appropriate state and federal agencies.”¹⁶ BellSouth filed a

¹² See *id.* at 3-4.

¹³ *Id.* at 5.

¹⁴ See *id.*, *BellSouth’s Response to Access Integrated Network, Inc.’s Motion to Open Show Cause Proceedings*, pp. 1-2 (Oct. 24, 2001).

¹⁵ E.g., *id.*, *Attorney General’s Petition to Intervene*, pp. 2-3 (Oct. 24, 2001).

¹⁶ E.g., *id.*, *Letter of AIN and XO*, p. 1 (Oct. 26, 2001).

responsive letter on November 1, 2001. BellSouth disagreed with AIN and XO's request and asked that the Authority enter the standard protective order.¹⁷

On November 1, 2001, AIN and XO filed motions to take discovery. AIN and XO attached identical requests to their respective motions. In addition, both complainants requested that the Authority order BellSouth to respond within ten days.¹⁸ BellSouth filed its response to the motions on November 2, 2001 objecting to the ten-day response period requested by AIN and XO.¹⁹

II. FINDINGS AND CONCLUSIONS

A. Consolidation

During the deliberations in Docket No. 01-00868 on October 23, 2001, the Directors unanimously voted to appoint a hearing officer to decide that case on its merits and instructed the appointee to determine whether Docket Nos. 01-00808 and 01-00868 should be consolidated.²⁰ Upon review of the record, it is apparent that AIN's and XO's complaints require resolution of the same legal and similar factual issues and request the same relief. The Hearing Officer finds that there is no need for these dockets to proceed independently of one another. In fact, proceeding in that manner would be unnecessarily duplicitous and could result in inconsistent outcomes. Therefore, the Hearing Officer concludes that Docket Nos. 01-00808 and 01-00868 should be consolidated. Docket No. 01-00808 shall be deemed closed after entry of this Order therein, the record in Docket No. 01-00808 shall be made a part of the record in Docket No. 01-00868 and all future filings shall be entered under Docket No. 01-00868.

¹⁷ See, e.g., *id.*, Letter of BellSouth, p. 1 (Nov. 1, 2001).

¹⁸ See, e.g., *id.*, *Motion to Take Discovery*, p. 1 (Nov. 1, 2001).

¹⁹ See, e.g., *id.*, *BellSouth Telecommunications Inc.'s Objection to Discovery Response Deadline Sought by Access Integrated Network, Inc.*, p. 2 (Nov. 2, 2001).

²⁰ See *In re: Complaint of XO Tennessee, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 01-00868, Transcript of Proceedings, Oct. 23, 2001, p. 23 (Authority Conference).

B. Petitions to Intervene

Tenn. Code Ann. § 4-5-310(a) sets forth the following criteria for granting petitions to intervene:

(a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:

(1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;

(2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of the law; and

(3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.²¹

Each of the Consumer Advocate's petitions is timely filed; substantiates that the legal interests represented by the Consumer Advocate may be determined in this matter; and demonstrates that the interests of justice and the orderly and prompt conduct of this matter should not be impaired by allowing the interventions. Additionally, BellSouth did not object to the petitions. Therefore, pursuant to Tenn. Code Ann. § 4-5-310(a), the petitions should be granted such that the Consumer Advocate may participate in this proceeding as its interests require and receive copies of any notices, orders or other documents filed in this docket.

C. Protective Order

The parties have raised an issue over the contents of the protective order through letters addressed to the General Counsel. AIN and XO state: "We believe the proposed order should be amended so that any proprietary information produced in these dockets concerning BellSouth's illegal marketing efforts may be made available to other, appropriate state and federal agencies

²¹ Tenn. Code Ann. § 4-5-310(a) (1998).

subject to the confidentiality rules of those other agencies.”²² In support of their request, AIN and XO noted that a similar amendment had been made to the protective order entered in Docket No. 01-00362, *In re: Docket to Determine the Compliance of BellSouth Telecommunications, Inc.’s Operations Support Systems with State and Federal Regulations*. BellSouth responded by stating: “BellSouth strongly disagrees and respectfully requests that you enter the standard protective orders proposed by BellSouth.”²³ BellSouth also distinguished Docket No. 01-00362 as involving regional issues.

The parties’ letters imply that a proposed order was filed in this docket. A review of the records in both dockets reveals, however, that none of the parties have filed a proposed protective order. Nevertheless, the Hearing Officer is of the opinion that this dispute may be resolved without reference to the actual document.

AIN and XO correctly note that the Pre-Hearing Officer in Docket No. 01-00362 did grant a motion for protective order, which included a protective order containing a provision allowing for information to be used in other regulatory commissions’ proceedings.²⁴ BellSouth did not oppose the entry of the protective order in Docket No. 01-00362 and stated that “it makes sense to use these things on a region-wide basis.”²⁵ The Hearing Officer finds that the determination in Docket No. 01-00362 is distinguishable from the facts and circumstances of this case. The issues involved in these dockets are not regional issues. Instead, they involve Tennessee consumers and violations of Tennessee’s laws and administrative rules.

²² *In re: Complaint of Access Integrated Network, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 01-00808, Letter of AIN and XO, p. 1 (Oct. 26, 2001).

²³ *Id.*, Letter of BellSouth, p. 1 (Nov. 1, 2001).

²⁴ See *In re: Docket to Determine the Compliance of BellSouth Telecommunications, Inc.’s Operations Support Systems with State and Federal Regulations*, Docket No. 01-00362, *Order Resolving Discovery Disputes*, pp. 5-6 (Oct. 17, 2001).

²⁵ *Id.*, Transcript of Proceedings, Oct. 9, 2001, pp. 49-50 (Pre-Hearing Conference).

Additionally, it has not been the general practice of this agency to enter protective orders permitting proprietary information to be given to other federal or state agencies. This practice is evidenced by the fact that counsel in Docket No. 01-00362 felt it necessary to bring the alteration to the attention of the Pre-Hearing Officer in the motion for protective order. Moreover, including the amendment requested by AIN and XO would result in a protective order that could prove difficult to enforce. To explain, if there is an alleged violation of the confidentiality rules of another state, then there may also be a violation of the protective order entered in this docket. This agency may then be called upon to review and construe another states' confidentiality rules and orders. Lastly, the parties have not asserted nor is there any reason to believe that another federal or state agency would be unable to obtain any of the information filed in this docket in that federal or state agency's own proceeding. Based on the foregoing, the Hearing Officer determines that the protective order shall be filed without the additional language proposed by AIN and XO.

D. Motions to Take Discovery

During the October 23, 2001 Authority Conference, the Directors unanimously appointed General Counsel or his designee to act as Hearing Officer in Docket No. 01-00868 and instructed the Hearing Officer to attempt to resolve the complaint within sixty (60) days of its filing. XO filed its complaint on October 9, 2001; thus, the sixty (60) day period expires on December 10, 2001.

Given the expedited period for resolution, it is also necessary to expedite discovery. In their motions to take discovery, AIN and XO filed their discovery requests and asked the Hearing Officer to require BellSouth to file its responses within ten days of the filing of the requests. That date is November 12, 2001. BellSouth does not object to having discovery in its responses to the motions, but, instead, objects to the November 12, 2001 due date. BellSouth contends it is entitled to thirty

(30) days pursuant to the Rule 33 of the Tennessee Rules of Civil Procedure and Authority Rule 1220-1-2-.11(1).

Rule 33 of the Tennessee Rules of Civil Procedure requires a party to respond to interrogatory requests within thirty (30) days of service.²⁶ Authority Rule 1220-1-2-.11(1) provides that “discovery shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure” when attempts at informal discovery have failed.²⁷ Nevertheless, Authority Rule 1220-1-1-.05 provides: “For good cause, including expediting the disposition of any matter, the Authority may waive the requirements or provisions of any of these rules in a particular proceeding, on motion of a party or on its own motion, except when a rule embodies a statutory requirement.”²⁸

The Hearing Officer finds that there is good cause in this case to shorten the response period. As previously stated, it is incumbent upon the Hearing Officer to see that every effort is made to resolve these complaints on or before December 10, 2001. If BellSouth were permitted to respond to discovery on December 1, 2001, as it requested, this goal would certainly be out of reach. Therefore, the Hearing Officer concludes that the motions to take discovery shall be granted and BellSouth shall respond to discovery on or before Friday, November 16, 2001.

E. Issues raised by the Complaints and the *Motion to Open Show Cause*

Given the expeditious review ordered for these complaints, the Hearing Officer finds that there is a need to clarify the relief requested and available and to obtain answers to certain inquiries before proceeding to the filing of testimony and a hearing. To explain, a reading of the complaints and *Motion to Open Show Cause Proceeding* reveals inconsistencies in the relief requested. Also,

²⁶ Tenn. R. Civ. P. 33 (Vol.1 2001).

²⁷ Authority Rule 1220-1-2-.11(1) (Sept. 2000 Rev.).

²⁸ *Id.* 1220-1-1-.05(1) (Sept. 2000 Rev.).

the complaints do not specify which Authority Rules BellSouth has allegedly violated. Lastly, it is unclear whether the Authority may dispose of cases involving violations of Tenn. Code Ann. § 65-4-122.

1. Relief Requested

In the complaints, AIN and XO asserted a set of facts and alleged that, based on those facts, BellSouth appears to have violated Tenn. Code Ann. § 65-4-122, which prohibits discriminatory pricing, and TRA Rule 1220-4-8-.09(2)(c)(3).²⁹ As relief, AIN and XO requested the Authority issue a show cause order pursuant to Tenn. Code Ann. § 65-2-106 and take such other action as the Authority finds necessary and appropriate.³⁰ The *Motion to Open Show Cause Proceeding* filed by AIN requests slightly different relief. Specifically, the motion asks the Authority to “open a show cause proceeding to **investigate** whether BellSouth Telecommunications, Inc. (“BellSouth”) has engaged in a pattern of anticompetitive and discriminatory conduct by marketing services under terms and conditions which are inconsistent with the carrier’s tariffs.”³¹

Tenn. Code Ann. § 65-2-106 sets forth the circumstances under which this agency may issue a show cause order. That section provides:

The authority is empowered and authorized in the exercise of the powers and jurisdiction conferred upon it by law to issue orders on its own motion citing persons under its jurisdiction to appear before it and show cause why the authority should not take such action as the authority shall indicate in its show cause order appears **justified by preliminary investigation made by the authority under the powers conferred upon it by law**. All such show cause orders shall fully and specifically state the grounds and bases thereof, and the respondents named therein shall be given an opportunity to fully reply thereto. Show cause proceedings shall otherwise follow the provisions of this chapter with reference to contested cases, except where otherwise specifically provided.³²

²⁹ See, e.g., *id.*, *Complaint of Access Integrated Networks, Inc.*, p. 2 (Sept. 16, 2001).

³⁰ See *id.* at 3.

³¹ *Id.*, *Motion to Open Show Cause Proceeding*, p. 1 (Oct. 16, 2001) (emphasis added).

³² Tenn. Code Ann. § 65-2-106 (Supp. 2000) (emphasis added).

The language of this section indicates that an investigation must precede the issuance of a show cause order. Thus, the actual remedy available as a result of the filing of the complaints and the *Motion to Open a Show Cause Proceeding* must be the opening of an investigation.

2. Authority Rules

In the complaints, AIN and XO contend that BellSouth violated Authority Rule 1220-4-8-.09(2)(c)(3).³³ This rule does not prescribe, however, a specific violation. The rule merely establishes a duty on behalf of incumbent local exchange carriers to adhere to other Rules in chapter 1220-4-8 pertaining to: 1) “the provision of nondiscriminatory interconnection with other providers under reasonable terms and conditions”; 2) “the compliance with price floor and cost imputation restrictions on the pricing of competitive services”; and 3) “compliance with applicable tariff and special contract provisions.”³⁴ In the request for relief, AIN and XO request a show cause order issue in regard to violations of Authority Rules in general. A more definite statement of the grounds for violation is necessary in order to determine whether AIN and XO are entitled to relief. This conclusion is further justified by Rule 1220-1-2-.09(1)(a), which provides: “A formal complaint filed against a public utility regulated by the Authority shall . . . enumerate each statute allegedly violated by the defendant.”³⁵

3. Tenn. Code Ann. § 65-4-122

AIN and XO contend that BellSouth’s actions violate Tenn. Code Ann. § 65-4-122. Subsection (e) of this section provides: “An action may be brought by any person against any person or corporation, owning or operating such public service company in Tennessee, for the violation of

³³ See, e.g., *In re: Complaint of Access Integrated Network, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 01-00808, *Complaint of Access Integrated Networks, Inc.*, p. 2 (Sept. 16, 2001).

³⁴ Authority Rule 1220-4-8-.09(2)(c)(3) (Aug. 1999, Rev.).

³⁵ *Id.* 1220-1-2-.09(1)(d) (Sept. 2000, Rev.).

this section, **before any court having jurisdiction to try the same.**³⁶ Before proceeding with this claim, the Hearing Officer finds that there is an issue as to whether the Authority has subject matter jurisdiction over claims arising from Tenn. Code Ann. § 65-4-122. Therefore, it is necessary for the parties to submit legal briefs on the issue of whether the Authority is a court for the purposes of Tenn. Code Ann. § 65-4-122.

F. Procedural Schedule

In an effort to see that these complaints are resolved by December 10, 2001, the Hearing Officer adopts the following procedural schedule, including any aforementioned due dates:

- Proposed Protective Order Signed by All Parties **Friday, November 9, 2001**
- Briefs on Tenn. Code Ann. § 65-4-122 and AIN and XO's More Definite Statement **Tuesday, November 13, 2001**
- Responses to Discovery Requests **Friday, November 16, 2001**
- Pre-Filed Direct Testimony **Monday, November 26, 2001**
- Pre-Filed Rebuttal Testimony **Thursday, November 29, 2001**
- Pre-Hearing Conference **Friday, November 30, 2001 at 9:00 a.m.**
- Hearing **Monday, December 3, 2001 through completion³⁷**

³⁶ Tenn. Code Ann. § 65-4-122(e) (Supp. 2000) (emphasis added).

³⁷ The Hearing Officer is aware that a hearing is presently scheduled in Docket No. 01-00362, *In re: Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems With State And Federal Regulations* for these dates.

IT IS THEREFORE ORDERED THAT:

1. Docket Nos. 01-00808 and 01-00868 are consolidated. Docket No. 01-00808 shall be deemed closed after entry of this Order therein, the record in Docket No. 01-00808 shall be a part of the record in Docket No. 01-00868 and all future filings shall be entered under Docket No. 01-00868.

2. The petitions to intervene filed on October 24, 2001 by the Consumer Advocate and Protection Division of the Office of the Attorney General and Reporter are granted. The Consumer Advocate and Protection Division may participate in this proceeding as its interests require and the parties shall serve the Consumer Advocate with copies of any notices, orders or other documents filed in this docket.

3. All filings shall be made in accordance with the procedural schedule set forth herein. Filings shall be filed in the Executive Secretary's office by 2:00 p.m. on the specified date as provided for in Rule 1220-1-1-.11 and served on each of the parties via hand-delivery or facsimile. Testimony of witnesses shall be filed individually, separately paginated, and contain the caption of the case on the first page.

4. The request of Access Integrated Networks, Inc. and XO Tennessee, Inc. to include certain language in the protective order is denied.

5. The motions to take discovery filed by Access Integrated Networks, Inc. and XO Tennessee, Inc. on November 1, 2001 are granted. Discovery responses shall be served via hand-delivery or facsimile and filed in the Executive Secretary's office on the date specified in the procedural schedule.

6. The remedy available as a result of the filing of the *Complaint of Access Integrated, Inc.*, *Complaint of XO Tennessee, Inc.* and the *Motion to Open a Show Cause Proceeding* is the opening of an investigation.

7. Access Integrated Networks, Inc. and XO Tennessee, Inc. shall file a more definite statement enumerating the specific statutes and/or Authority rules allegedly violated by BellSouth Telecommunications, Inc.

8. Parties shall submit legal briefs on the issue of whether the Authority is a "court" as that term is used in Tenn. Code Ann. § 65-4-122.

9. Any party aggrieved with the Hearing Officer's decision in this matter may file a Petition for Reconsideration with the Hearing Officer within fifteen (15) days of the date of this Order.


Julie M. Woodruff, Hearing Officer

ATTEST:



K. David Waddell, Executive Secretary